1944. File No. S.Dwr. 6/44

Legal- DEPARTMENT

A- BRANCH

Examined

Subject:—

C.S.No. 452 of 1942

~~1) Irappa~~

1) Irappa Huchappa Sogalad.

2) Adiveppa Huchappa Sogalad. Plffs.

3) Madivellappa Huchappa Sogalad

V/s

Government

The Provincial of Bombay. Defts.

P 13 (E)

File No.. S.Dwr. 6/44

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This relates to Dharwar Civil Suit 452 of 1942. The plaintiffs claim that they are owners of a tank situated in Government land and which serves as a feeder tank to another tank which has been declared a second class irrigation work. The suit turns upon evidence, and there is sufficient documentary evidence to negative the plaintiffs' contention.

2. Sanction may be accorded to the defence of the suit on the lines of the appended brief. A revised draft written statement is also put up.

19/6

R.L.A. I think Govt has a very strong case.

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Secy R.D. 23.6.43

In the Court of the First Class Sub-Judge at Dharwar.

L.C. Suit No.452 of 1942.

Irappa Huchhappa Sogalad and two othrs.....plaintiffs.

vs.

The Provincial Government of Bombay.....defendant.

The written statement of the abovenamed defendant is as follows :-

1. The plaintiffs' claim is denied in toto.

2. The suit is barred under section 83(3) of the Bombay Irrigation Act,1879, inasmuch as it calls in question the relevant entries contained in the Irrigation Record was of Rights prepared in 1923. The said Record was duly published under section 81 of the said Act on ..... at.....

Here enter date and place of publication.

3. Alternatively, the suit is barred under Article 120 of the Limitation Act,1908, as the rights now claimed were denied and invaded by this defendant in 1923, or at any rate in 1930. The allegations and contentions in paragraphs 7 and 8 of the plaint are denied.

4. The Basavannadevar tank (hereinafter referred to as the said tank) belongs to this defendant. The land of S.N.6 of Amargol, in which it stands, is also the property of this defendant and has been so held by it since the earliest times of which any record is extant. At a short distance from it is another tank, called the Topin tank, which, together with S.N.318 ~~whor~~ wherein it lies, is also the property of this defendant. From the earliest times of which evidence is available the suit tank has been used mainly as a feeder tank to the Topin tank, and water from the latter tank is given to cultivators of lands nearby.

5. The Topin tank is now notified as a second class Irrigation Work under Part X of the Bombay Irrigation Act,1879, and an Irrigation Record of Rights has been prepared. The suit tank is treated as a subsidiary work. According to the Record of Rights abovesaid, certain lands are irrigable by the Topin tank. This defendant affirms that the plaintiffs

The D.G.P. shows verify.

have only such rights with respect to the tanks or either of them as are noted in the said Record of Rights. This denies the that the plaintiffs have, or that they or any of their predecessors in title, ever had, rights in relation to any of the said tanks superior to those appearing from the said Record.

6. The allegations in paragraphs 2,3,4,5,6 and 7 of the plaint are incorrect and misleading and are denied.

7. It is denied that the plaintiffs have a right to draw water from the suit tank directly by an independent channel for the cultivation of s.n.323. It is denied that they or any person through whom they claim ever acquired such right in any mode whatever.

8. It is denied that any independent channel existed at any time through which water could flow from the suit tank directly to S.N.323. The allegations that the plaintiffs ancestors had constructed or repaired such channel. The allegations as to user are denied. The Channel referred to in paras.2 and 3 appears to be the feeder channel coming from the suit tank to the Topin tank. The china pipe only connected the Topin tank with the plaintiffs land; its head was placed in the dam of the Topin tank and not in the feeder channel coming from the suit tank. The allegations to the contrary are denied.

9. It is denied that any rights now claimed by the plaintiffs have been upheld by civil courts or have been conceded and acted upon by any person interested to deny them or by Government.

10. The order of the Collector is lawful and correct. The circumstance that the plaintiffs are assessed to water rate negatives the rights claimed in the suit. The claim is barred by the plffs acquiescence and laches.

11. It is submitted that the plaintiffs are not entitled to any of the reliefs prayed for, and that the suit be dismissed with costs.

District Government Pleader,Dharwar.

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I District Government Pleader, Dharwar, do hereby declare that what is stated in paragraphs 1 to 11 above is true according to the information received and believed to be true. This verification is made at this day of 1943.

District Government Pleader,
Dharwar.

Suits :

Dharwar.

For a declaration that the plaintiffs are the owners of the Basavannadevar tank and have a right to take water to their lands in Revision Survey No. 323 direct through the pipe line.

GOVERNMENT OF BOMBAY.

LEGAL DEPARTMENT.

Resolution No. 4488.

Bombay Castle, 25th June 1943.

Letter from the Collector of Dharwar, No. L.A.W. 415, dated the 17th March 1943—Forwarding papers in the suit noted in the margin; and requesting sanction to its defence.

IN THE COURT OF THE FIRST CLASS SUB-JUDGE, DHARWAR.

Civil Suit No. 452 of 1942.

(1) Irappa Huchappa Sogalad; (2) Adiveppa Huchappa Sogalad; (3) Madivellappa Huchappa Sogalad ... Plaintiffs;

versus

The Provincial Government of Bombay ... ... Defendant.

Endorsement by the Commissioner, Southern Division, No. L.S.T. 281, dated the 2nd April 1943—Forwarding the above with his concurrence.

Memorandum to the District Government Pleader, Dharwar, No. 4487, dated the 25th June 1943—Forwarding a copy of the brief with its accompaniments in advance.

RESOLUTION.—The defence of the suit should be sanctioned on the lines of the accompanying brief.

By order of the Governor of Bombay,

Original.

P. N. MOOS,
Secretary to Government.

G. R., No. 4488, L. D., dated the 25th June 1943.

To

*The Revenue Department,
*The Public Works Department,
*The Commissioner, Southern Division,
*The Collector of Dharwar,
*The Executive Engineer, Dharwar Division, Dharwar,
The District Government Pleader, Dharwar (with two copies of the brief).

Issued 25/7

*With a copy of the brief.

No. of 1943.

Copy forwarded for information and guidance to S.G. Sc Belgaum

Subdt. after issue

2 File in a new suit file

25/7.

A.P.A.

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DHARWAR CIVIL SUIT No. 452 OF 1942.

Chronological Statement of Facts.

The plaintiffs in this suit claim title to or in the alternative certain defined rights with respect to a tank called Basavannadevarkeri tank situated in Revision Survey No. 6 of Amangaol.

See sketch at p. 91 of file II.

2. Revision Survey No. 6 has also the tank therein belong to Government. The tank appears to have been constructed possibly in pre-British times by throwing a dam across a shallow valley and thus holding back the surface water collecting there from the surrounding slopes. It is not an irrigation tank, and apart from the supply of water made to Survey No. 5, its water is used for the purpose of feeding the Topinkeri tank, situated apparently at a lower level in Revision Survey No. 316. The Topinkeri tank is an irrigation tank and irrigates Revision Survey Nos. 316, 319, 320, 321 and 323. The present plaintiffs are the occupants of Survey No. 323 abovesaid, and it appears that that holding has no other source of water supply.

3. It appears that till 1887, Survey No. 5 lay waste and belonged to Government, and the channel through which the water from the Basavannadevar tank flew into the Topinkeri tank lay through this land. In that year the land was purchased by one Dod-Kallappa Badigar who brought it under cultivation. The record mentions many disputes relating to the water supply from that date onwards of which it is necessary to mention the more important ones.

p. 21 of file III.
p. 19 do.

4. In 1887, the present plaintiffs' grand-father Basappa Mugappa filed a wahivat suit against the said Dod-Kallappa in the Court of the Mamlatdar of Hubli, and obtained an injunction restraining the defendant from interfering with the flow of water.

5. It appears that another and a more serious dispute arose in about 1901 between Huchappa, plaintiffs' father, on the one hand, and Bhima and Laxman, nephews of the abovesaid Dod-Kallappa, on the other. The latter were prosecuted at the instance of Huchappa under section 430, Indian Penal Code, and convicted, but were acquitted on appeal.

6. Huchappa then filed Civil Suit No. 87 of 1903 against Bhima and Laxman in the Court of the Second Class Sub-Judge at Hubli alleging that the water from the Basavannadevar tank flows, since ancient times, into the Topinkeri tank, and thence to the plaintiffs' land Survey No. 323, that the defendants had obstructed the flow of the water causing him loss, and prayed for an injunction. The defendants contended that the plaintiff had no right to the water of the Basavannadevar tank, that they had a right to the said water, and that the waste and overflowing water passed into the Topinkeri tank, from which alone the plaintiff was entitled to receive water.

p. 19 of file II.

7. The findings of the District Judge, in Civil Appeal No. 63 of 1905 (whose judgment and decree were confirmed by the High Court in Second Appeal No. 432 of 1906) may be briefly summarised.

p. 37 do.

(*a*) The original channel from the Basavannadevar tank to the Topinkeri tank, which was presumably the most convenient in view of the topographical considerations, must have lain through Survey No. 5 belonging to the defendants. A new and artificial channel, sometimes 10 feet deep cut into hard rock was constructed and it skirted the cultivated area and kept close to the

Government waste. The District Judge was of opinion that it was highly probable that the plaintiff may have constructed this channel because the holder of Survey No. 5 objected to the channel passing through his land in order that his water-supply might not be diminished.

(*b*) Both the Basavannadevar and Topinkeri tanks are Government property: the plaintiffs' immediate source of supply is the latter, which is in turn dependent upon the former.

(*c*) There is an arrangement in force between the owners of the Topinkeri tank of whom the plaintiff is one, regulating the manner in which the available water, including that in the Basavannadevar tank, shall be applied to their lands, and the plaintiff has no exclusive right even as against the defendants.

(*d*) Basavannadevar tank is an artificial tank constructed presumably to improve the water-supply of the lands in the neighbourhood; but the water stands on Government land. The plaintiff has abduced no proof of any express grant from Government giving him any right to such water; but by reason of immemorial user, the plaintiff may be said to have acquired a limited right (but not exclusive right) to receive "as much water as may be necessary for the proper cultivation of irrigated crop in that land".

(*e*) As the defendants' obstruction was in excess of their own rights and had the effect of interfering with the limited right of the plaintiff, the plaintiff was awarded damages.

8. It appears that some time in 1922, the Irrigation Department assumed charge of the tanks. Presumably the Topinkeri tank was declared a Second Class Irrigation Work under Part X of the Bombay Irrigation Act, 1879, and the Basavannadevar tank was dealt with as a work subsidiary thereto. (The District Government Pleader should, however, verify the correct position through the Collector, and obtain and produce in Court the notifications and other documents relative to the proceedings.)

9. In 1923, the Irrigation Record of Rights was framed, with regard to the said tank, under section 73 of the Bombay Irrigation Act, 1879. It shows the Topinkeri tank as an irrigation tank from which certain lands, including Survey No. 323, are irrigable. A water rate is levied on all these lands (section 44).

10. It appears from the letter of the Executive Engineer, dated 29th April 1929 and 11th November 1929, that while the Irrigation Department repaired the Topinkeri tank in 1923, Huchappa applied for, and induced the Executive Engineer to pass, an order to the effect that a pipe be constructed for the purpose of securing the water-supply to Survey No. 323; and that accordingly a pipe was provided which connected the dam of the Topinkeri tank, with Survey No. 323. The suggestion that it connected the *feeder channel* (between the two tanks) so as to enable Huchappa to receive water from the Basavannadevar tank before it reached the Topinkeri tank, seems to be unfounded. (File III page 69.)

p. 69 of fil III.
p. 1 of file I.

11. It appears that in 1929, disputes arose between Huchappa on the one hand and his neighbours on the other, and the Magistrate, First Class, Hubli, made an order under section 144 of the Criminal Procedure Code, 1898, directing Huchappa not to take water from the Basavannadevar tank, but the order was later vacated. Huchappa on his part filed a complaint under sections 426 and 430, Indian Penal Code, against several persons, but the accused were discharged.

pp. 44 and 49 of file III.

p. 53 of file II.

12. On 8th June 1929 and 20th June 1929, Huchappa applied to the Collector praying that an entry be made in the Irrigation Record of Rights to the effect that Survey No. 323 is irrigable by the Basavannadevar tank by means of an independent pipe running through the Topinkeri tank. He contended that he had the exclusive right to receive water directly from the Basavannadevar tank. On 14th October 1929, one B. L. Desai, holder occupant of Revision Survey No. 315, submitted a petition opposing the said application. On 28th January 1930, the Collector rejected Huchappa's application, and also requested the Executive Engineer, under section 26 of the Bombay Irrigation Act, to remove the pipe referred to in paragraph 9 ante.

13. On 11th July 1930, Huchappa gave a notice of suit, but he seems to have died soon afterwards.

14. On 22nd July 1942, the plaintiffs gave a notice under section 80 of the Civil Procedure Code, 1908, and on 9th October 1942, filed the present suit praying for—

(1) a declaration that the plaintiffs are owners of the Basavannadevar tank and have the exclusive right to receive water therefrom directly;

(2) a consequential injunction and a mandatory injunction Government to restore the pipe; and

(3) costs.

Grounds of Defence.

Limitation.—Section 83 (3) of the Bombay Irrigation Act, 1879, provides that any suit in which an entry made in any Record of Rights prepared under Part X of the Act is directly or indirectly called in question shall be dismissed (although limitation is not set up as a defence) if it has not been filed within one year from the date of the publication under section 81 of the Record of Rights containing such entry. The reliefs claimed in the suit are essentially inconsistent with the entry in the Record made in 1923 relating to the plaintiffs' land, and to the two tanks, and may be properly said to call it in question, indirectly at any rate. The District Government Pleader should produce evidence to show when the Record was so published, and urge that as the suit was now filed within the limitation period prescribed, it is not barred.

2. Alternatively, the suit being one for declaration and injunction, falls under Article 120 of Schedule I to the Limitation Act, 1908 (*see* A.I.R. 1929 All. 529). The starting point of limitation is the date on which the right to sue accrued to the plaintiffs or their predecessor-in-title (22 All. 33 · 12 Lah. 262), and the right to sue can properly be said to arise at the moment when the defendant invades or threatens to invade the right claimed by the plaintiff in the suit (35 Bom.L.R. 440 P C.). In this case, the rights now claimed by the plaintiffs were denied by Government in 1923; they were categorically denied in 1930 and effective steps were taken by March 1930 (when the pipe was removed, *see* File I p. 59) to preclude enjoyment by the plaintiff of the least vestige of any of the rights claimed. The suit is therefore barred under Article 120.

The plaintiffs, however, rely upon section 23 of the Indian Limitation Act, 1908, to evade the bar of limitation. That section, however, has no application to suits seeking a declaratory decree (*see* 31 Bom.L.R. 1240 and the cases there cited). Moreover, it cannot properly be said that any continuing wrong is involed in this case. The plaintiffs' contention seems to be that they have been prevented from enjoying the rights claimed by them in this suit by the act of Government in removing the pipe.

If the removal of the pipe was a legal wrong, it was an act completed once for all in or about March 1930. The expression " continuing wrong " refers to the act of the wrong-doer and not to the results of that act. The section can only apply where the act itself can upon a reasonable view be said to be continuing, and the mere circumstance that the results flowing therefrom have been to continue to deny the rights of another person is irrelevant. An act complete in itself may have effects which continue for a long time (e.g. the infliction of a personal injury) or even permanently. But the wrong is done once for all; it is not a continuing wrong. The principle is well illustrated with respect to dispossession of a person from immoveable property which has been held not to be a continuing wrong (*see* A.I.R. 1940 Lah. 359 F.B.). In the present case the wrong alleged, namely, the removal of the pipe, was complete once for all by March 1930, and the act cannot be said to have continued. Government has done no further act, nor have the plaintiffs themselves tried to assert any rights since then. Clearly, therefore, section 23 can have no application to the facts of this case. On the plaintiffs' interpretation, section 23 would operate to render the Limitation Act largely nugatory. Such interpretation is contrary to judicial decisions with reference to several of the Articles in the Schedule.

3. *Merits.*—The plaintiffs claim title to the tank itself. Their case is that it was constructed on his own land by one Mallappanavar 200 years ago and that plaintiffs predecessors-in-title purchased it from his successor. But there is not an iota of evidence in support of this claim.

In the first place there is no cogent evidence to shew that Mallappanavar constructed the tank. The entry in the survey papers of 1847 to that effect cannot but be the record of a floating legend of doubtful authenticity, and is altogether unreliable. Moreover that entry does not say that the land belonged to Mallappanavar. That the story is improbable is apparent from (1) the circumstance that the tank is of such a size that it could only have been constructed at public expense for irrigating neighbouring lands and (2) the fact that the land upon which it stands has, from the earliest period of which records are extant, belonged to Government.

Secondly, there is no evidence at all of the plaintiff family having acquired any interest therein from any person claiming through Mallappanavar.

4. On the contrary, the evidence clearly establishes that tank and the land upon which it stands belong to Government: (i) the admission made by the plaintiffs' father Huchappa in the plaint in the wahivat suit of 1887, that the tank belongs to Government is evidence against the plaintiffs (section 21 of the Evidence Act; 9 Bom.L.R. 267 P.C.), (ii) the tank was held by the Civil Courts to be Government property and not that of the plaintiffs' family (*see* File II p. 19), (iii) Government records from the earliest times consistently testify to the same effect: *see* the *talav patrika, neersargi patrika,* the Survey Records of 1847 and 1878 and *prati* book.

The plaintiffs land lies far away; they do not own, and claim no title to Survey No. 6 on which the tank is situated. Their claim is improbable in the extreme.

5. The plaintiffs contend that they have all along taken water directly from the tank in question by an exclusive and independent channel. This contention is advanced partly in support of their alleged title to the tank, and partly in support of an alternative claim to a right to draw water accordingly. But this contention is quite contrary to facts. It appears that the record of

This evidence establishes beyond all possibility of doubt that from time immemorial (1) the Topinkeri tank has always been, and the suit tank never was, the immediate source of supply to Survey No. 323 and (2) the occupant of Survey No. 323 drew water from the tank to the same extent as, and enjoyed or exercised no higher rights or privileges than, the occupants of other lands irrigable by the Topinkeri tank, and (3) that the rights of the occupant of Survey No. 323 (and other persons above said) adjudged by the Court (in Civil Appeal No. 63/1906) were not so exclusive or dominent as to preclude the occupant of Survey No. 5, who had but lately taken up that land from Government and brought it under cultivation, from drawing water from the suit tank for irrigation purposes. The evidence of user therefore only negatives the plaintiffs' contentions.

6. The suit tank clearly belongs to Government, and Government has the right to regulate the collection, retention and distribution thereof (*see* Bom. 209, 28 Bom. 105, 26 I.C 18). Moreover, the Topinkeri tank, to which the suit tank is a subsidiary work, has been declared to be a second class irrigation work, and the water-supply therefrom is now being regulated by Government. The plaintiffs have only such rights as are recorded in the Record of Rights—namely to draw water from the Topinkeri tank, subject to the supply being available and consistently with similar rights of holders of other lands irrigable by the tank. The plaintiffs have no right directly to draw water from the suit tank. It would appear that they have a right merely to require that water-supply from that tank to the Topinkeri tank is not unduly diminished.

7. The suit is barred by laches as the plaintiffs have suffered themselves to be taxed in respect of water-supply on the basis that the sources of supply belong to or are controlled by Government [*see* section 44 of the Bombay Irrigation Act, 1879, read with section 3(*l*)].

8. For all these reasons, it should be urged that the suit fails and should be dismissed with costs.

the Hubli Civil Suit No. 87 of 1906 contains evidence which might be of use on the point of user, and the District Government Pleader should examine the record and obtain copies of such documents as are relevant and produce them.

The position can be conveniently set out with reference to three distinct periods :—

(1) Before 1887, the water from the suit tank flowed into the Topinkeri tank by a natural channel. The plaintiffs' ancestors drew water from Survey No. 323 from the Topinkeri tank. Holders of other lands likewise drew water therefrom.

(2) After 1887, Survey No. 5, through which the natural channel ran and which was hitherto waste land, was purchased by one Dod-kallappa who cultivated it, and irrigated the land by water drawn directly from the suit tank. He seems also to have obstructed the natural channel. Thereupon an artificial channel was cut with much labour—possibly by the then occupant of Survey No. 323, as is suggested by the District Judge in 1906, but more probably by him in co-operation with the holders of the land likewise interested—to connect the two tanks. The significant point is that the channel ran from the suit tank into the Topinkeri tank ; and it is from the latter tank that water was drawn for irrigating Survey No. 323. This is clear from the plaint of Huchappa in Civil Suit No. 87 of 1903 as summarised by the trial Judge (File II p. 1).

(3) In 1923, the Irrigation Record of Rights was framed, and the occupant has been drawing water from the Topinkeri tank in accordance therewith, i.e. to the same extent as the holders of lands irrigable thereby. Between 1923 and 1930 he drew the water through a pipe, which the Irrigation Department had put up, leading from the dam in the Topinkeri tank to Survey No. 323, but after its removal in 1930, the plaintiffs have presumably reverted to the old method of drawing water from the Topinkeri tank.